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AMAN SETIA LAND SDN BHD v. BENG CHOO VENTURES SDN BHD

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[CIVIL SUIT NO: PA-22NCVC-22-02-2023]
5 JULY 2024

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Abstract – *The court should not allow a party to call fresh expert witnesses after the commencement of trial for the following reasons: (i) it would cause injustice to the opposing party; (ii) it runs counter to the objective of the Rules of Court 2012 which is to prevent trial by ambush and to ensure a just, expeditious and economical disposal of civil actions; (iii) it would delay the completion of the trial and escalate costs unnecessarily; and (iv) it would circumvent the court's pre-trial directions. In an application for leave of the court to call a fresh expert witness after the commencement of trial, the onus is on the applicant to show exceptional circumstances in the interest of justice and also that there is no prejudice to the opposing party.*

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CIVIL PROCEDURE: *Trial – Witness – Expert witness – Application to call expert witness and adduce expert's statement and report after trial had commenced – Guiding principles – Whether would cause injustice and prejudice to opposing party – Whether runs counter to objective of preventing trial by ambush and to ensure just, expeditious and economical disposal of civil actions – Whether would delay completion of trial and escalate costs unnecessarily – Whether would circumvent court's pre-trial directions – Whether there were exceptional circumstances in interest to allow application – Rules of Court 2012, O. 34 & O. 40A*

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The plaintiff filed the present action, on 13 February 2023, premised upon the allegation that the defendant was in breach of a sale and purchase agreement ('SPA'). The plaintiff had adduced an expert report which showed that the market value of the defendant's entire shareholding in MCL was in the range of RM200,000 to RM300,000. The defendant denied this. Following the close of pleadings, case managements were held. The plaintiff announced an expert witness on share value and sought filing directions pursuant to O. 40A of the Rules of Court 2012 ('ROC'). The defendant did not indicate any expert witnesses. The court ordered the plaintiff to file the report and set trial dates. Despite court orders, the defendant failed to file any expert report or witness list by the deadlines. It was only during the case management, held on 6 December 2023, that the defendant informed that it would file the list of witnesses soon and would call its witnesses. The defendant was then directed to file its list of witnesses by 11 December 2023.

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Pursuant to the above, the defendant filed their list of witnesses where only two witnesses were listed. The trial then proceeded with the plaintiff producing three witnesses, including an expert witness ('PW3') who was cross-examined by the defendant. The matter was then adjourned on 21 March 2024 for the defendant to produce its two witnesses as indicated earlier with witness statements having been filed accordingly. However, on 4 March 2024, the defendant filed a witness statement of one Andrew Heng ('encl. 35') and expert report, indicating its intention to call him as an additional witness. Hence, these two applications: (i) the plaintiff sought an order that the defendant be not allowed to call Andrew Heng and for the expungement of encl. 35 and the expert report of Andrew Heng ('encl. 45'); while (ii) the defendant sought an order that it be allowed to call Andrew Heng and for encl. 35 and the expert report of Andrew Heng to be admissible ('encl. 47').

Held (allowing encl. 45; dismissing encl. 47):

(1) There had been no indication whatsoever that the defendant intended to call any expert witness in relation to the value of the shares. This was in stark contrast of the plaintiff's having consistently informed the court that they would be calling an expert witness on this issue. The defendant had more than ample time before the commencement of the trial, to produce an expert witness, in compliance with O. 34 r. 2 and O. 40A of the ROC. As such, the defendant failed to discharge the burden to show exceptional circumstances in the interest of justice as to why they should be allowed to call an expert witness after the commencement of trial. (para 46)

(2) The purported evidence to be given by the defendant's additional witness, as an expert, was in relation to the market valuation of the defendant's 45% shareholding which was an issue clearly known to the parties from the pleadings long before the commencement of the trial. Despite knowing from the very first case management, on 11 May 2023, that the plaintiff would be calling an expert witness in respect of the market valuation of the 45% shareholding in the company, the defendant did not elect to call any expert witness. The need to call an additional expert witness only cropped up after the re-examination of PW3, on 24 January 2024. The defendant failed to show any reason for the omission in including Andrew Heng or any expert witness in its list of witnesses notwithstanding the ample amount of time that had been given. The words used in the defendant's list of witnesses that 'Defendants reserve their rights to call further witnesses (if any) to refute any relevant evidence which may be presented by the plaintiff later' did not in any way afford the defendant the privilege to call Andrew Heng after the commencement of the trial belatedly at this stage. To be afforded with such privilege would make a mockery of O. 34 r. 2 and O. 40A of the ROC. (paras 48-50)

(3) Applying the case of *Linsun Engineering Sdn Bhd v. Shin Eversendai Engineering Sdn Bhd* ('*Linsun Engineering*'), the court's power regarding expert witnesses is governed by O. 34 r. 2(2)(p), (r) and O. 40A rr. 1, 2, 3(1), 5(1) to (3) and (5) of the ROC with a clear objective of ensuring just, expeditious and economical disposal of civil actions. As a general rule, the court should not allow the defendant to call a 'fresh' expert (who had not prepared a written expert's report and had not participated in a hot-tubbing of experts) after the commencement of a trial. While there may be exceptions to the general rule, as stated in *Linsun Engineering*, these exceptions were not applicable to the facts of this case. The defendant's justification or circumstances did not fall within the said exceptions. Allowing the defendant to adduce expert evidence at this late stage would tantamount to a miscarriage of justice and would be contrary to the rules which provide for, *inter alia*, a discussion between the experts and preparation of joint statements on the issues. To allow encl. 47 would occasion grave injustice to the plaintiff as Andrew Heng would be trying to rebut the plaintiff's expert witness after giving evidence and cross-examined and thus, preparing the expert report after having the advantage of hearing PW3's evidence in court. (paras 53-56)

(4) Enclosure 35 and the expert report of Andrew Heng should not be allowed as the defendant filed them on 4 March 2024, long after the period to do so had expired and after the plaintiff's witnesses had given their evidence in court. The introduction of these additional bundle of documents at this late stage was certainly grossly unfair to the plaintiff as they had prepared for trial on the basis that the bundle of documents had been disclosed and agreed upon by both parties. There was clearly an unjustified inordinate and inexplicable delay as to why these additional documents were not introduced earlier. The additional documents were not admitted in these proceedings. (paras 63-65)

Case(s) referred to:

Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin Ramli & Ors And Another Case [2017] 7 CLJ 488 HC ***(refd)***

Item Industrial Engineering Sdn Bhd & Ors v. Bank Utama (Malaysia) Bhd [2015] 1 CLJ 933 CA ***(refd)***

Linsun Engineering Sdn Bhd v. Shin Eversendai Engineering Sdn Bhd [2023] CLJU 635; [2023] 1 LNS 635 HC ***(refd)***

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107 HC ***(refd)***

Premium Park Development Sdn Bhd v. Right Base Trading Sdn Bhd [2021] CLJU 517; [2021] 1 LNS 517 HC ***(refd)***

Quantum Petroleum (M) Sdn Bhd & Anor v. Manimaran Periasamy & Ors [2019] CLJU 2094; [2019] 1 LNS 2094 HC ***(refd)***

SA Architects Sdn Bhd v. SAA Architects Pte Ltd [2023] CLJU 1679; [2023] 1 LNS 1679 HC ***(refd)***

Starflex Energy (M) Sdn Bhd v. Gema Antara Sdn Bhd [2023] CLJU 206; [2023] 1 LNS 206 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 34 rr. 2(2)(c), (d), (e), (m), (p), (r), O. 40A rr. 1, 2, 3(1), 5(1), (2), (3), (5)

For the plaintiff - Lim Hock Siang & Daniel Khoo Kelvin; M/s Presgrave & Matthews
For the defendant - Anoop Singh; M/s Anoop & See

Reported by Najib Tamby

JUDGMENT

Anand Ponnudurai J:

Introduction

[1] This judgment deals with the often-recurring situation of parties attempting to adduce further documents, expert reports and witnesses after a trial has commenced and the issue that arose in this case was whether the court should exercise its discretion to allow the same.

[2] The trial of this matter proceeded in January 2024, with the plaintiff calling three witnesses, including an expert witness who was cross-examined by learned counsel for the defendant. The matter was then adjourned to 21 March 2024 for the defendant to produce its two witnesses as indicated earlier with witness statements having been filed accordingly. However, on 4 March 2024, the defendant filed a witness statement of one Andrew Heng (encl. 35) and an expert report as reflected at pp. 9 to 887 of the defendant's additional bundle of document (encls. 36 to 43), indicating its intention to call him as an additional witness. This then led to two applications being filed in relation to this issue of whether or not the defendant could call Andrew Heng as the defendant's expert witness.

[3] The plaintiff then filed an application through encl. 45 seeking an order that the defendant be not allowed to call Andrew Heng as the defendant's expert witness and an order that the witness statement of Andrew Heng (encl. 35) and an expert report reflected at pp. 9 to 887 of the defendant's additional bundle of document (encls. 36 to 43) be expunged from the records.

[4] On the other hand, the defendant, in its application through encl. 47, conversely sought an order that Andrew Heng be allowed to be called as the defendant's expert witness and an order that the witness statement of Andrew Heng (encl. 35) and the expert report of Andrew Heng be admissible.

[5] Having heard parties submit aided by their written submissions, I was of the view that Andrew Heng should be disallowed to testify and his expert report to be inadmissible and expunged from the records. I thus allowed the plaintiff's application in encl. 45 and dismissed encl. 47.

[6] I will hereinbelow set out the salient background facts leading to these applications, the parties' respective contentions and my analysis of the same in arriving at my decision to allow encl. 45 and dismiss encl. 47.

A **The Salient Background Facts/Proceedings**

[7] This action was filed on 13 February 2023. The plaintiff's pleaded case is basically that the defendant is in breach of the sale and purchase agreement entered between the Chan sisters and the plaintiff dated 13 May 2019 (hereinafter referred to as "SPA") read together with an accession B agreement dated 21 January 2021 entered into between the plaintiff, the defendant and the Chan sisters (hereinafter referred to as "accession agreement") as follows:

(i) firstly, the defendant is in breach of contract because the terms of the C supplementary agreement executed between MCL and PKB, which was procured by the defendant, failed to fulfil the requirements of cl. 3.1(a) of Schedule C of the SPA. Consequently, the defendant is liable to pay the plaintiff the agreed liquidated damages in the sum of RM2,000,000 pursuant to cl. 3.1(a) of Schedule C of the SPA.

D (ii) secondly, the defendant is in breach of contract for failing to provide security property pursuant to the terms of cl. 3.2(a)(i)(aa), (bb) and (cc) of Schedule C of the SPA. Consequently, the defendant is liable to pay the plaintiff agreed interest pursuant to cl. 3.2(a)(ii) of Schedule C of the SPA totalling RM1,630,720.86 (calculated up until 9 January 2023). Since the defendant failed to pay the aforesaid agreed interest, the E defendant is liable to transfer to the plaintiff such number of its shares in MCL, the market value of which is equivalent to the amount of the agreed interest.

[8] The plaintiff has adduced Mazars' expert report which shows that the F market value of the defendant's entire 45% shareholding in MCL is in the range of RM200,000 to RM300,000 as at 31 May 2023.

[9] The plaintiff sought the following reliefs against the defendant in this action:

G (i) an order that the defendant pay the plaintiff forthwith the sum of RM2,000,000, being the agreed liquidated damages pursuant to cl. 3.1(a) of special conditions.

(ii) a declaration that the defendant is liable to pay the plaintiff agreed interest pursuant to cl. 3.2(a)(ii) of special conditions totalling H RM1,630,720.86 (calculated up until 9 January 2023).

(iii) an order that the defendant shall forthwith transfer the defendant's entire 45% shareholding in the MCL to the plaintiff at its own costs and expense to discharge the defendant's liability to pay the agreed interest to the extent of the market value of the defendant's shares in MCL I amounting to RM300,000 pursuant to the Mazars' expert report or such other value as determined by this Honourable Court.

(iv) an order that the defendant shall pay to the plaintiff the balance of the agreed interest calculated as at the date of judgment after deducting the market value of the defendant's shares in MCL amounting to RM300,000 pursuant to the Mazars' report or such other value as determined by this Honourable Court.

[10] The defendant, in their statement of defence, denies any breach of contract and critically, relevant to this application, in relation to the plaintiff's pleaded case that the market value of the defendant's shares was RM300,000 pursuant to Mazar report, the defendant at para. 28 of its defence pleads as follows:

> Defendant avers that the market value of the Defendant's shares is way higher than from what is alleged by the Plaintiff and compared to the buying of 55% of shares by the Plaintiff at the price of RM10 million clearly shows that the Plaintiff's allegations are baseless/unfounded.

[11] The defendant at para. 11 of the defendant's summary of case dated 11 December 2023 (encl. 20) contends that "the market value of the defendant's shares is way higher than from what is alleged by the plaintiff and compared to the buying of 55% shares by the plaintiff at the price of RM10 million clearly shows that the plaintiff's allegations are baseless/unfounded."

[12] In para. 14 of the issues to be tried dated 10 November 2023, one of the issues to be tried as agreed by both parties was as follows:

> What is the market value of the Defendant's entire 45% shareholding in MCL?

[13] It is best and appropriate that I set out hereinbelow the chronology of events in relation to the case managements that were conducted after the close of pleadings and the trial that proceeded thereafter.

[14] At the first case management held on 11 May 2023:

(i) the plaintiff's counsel had informed the court that the plaintiff would be calling an expert witness on the market value of the defendant's shareholding in MCL and sought directions for the filing of the expert report pursuant to O. 40A of the Rules of Court 2012.

(ii) the defendant's counsel did not indicate that the defendant would be calling any expert witness.

(iii) the parties were directed to file pre-trial documents by 1 October 2024 and witness statements to be exchanged two weeks before trial which was fixed on 22 to 24 January 2024.

[15] Pursuant to the Senior Assistant Registrar's email dated 21 May 2023, the court informed and directed, *inter alia,* as follows:

A (i) the trial is fixed from 22 to 24 January 2024.

(ii) the plaintiff is to file its expert report pursuant to O. 40A r. 3 of the Rules of Court 2012.

[16] Thereafter, two more case managements were held on 2 and
B 24 October 2023 to update the court on the status of the filing of pre-trial documents. The defendant still had not indicated to the court that it would call any expert witness on the market value of the defendant's shares in MCL.

[17] Pursuant to a physical case management held on 3 November 2023
C before me, the parties were directed, *inter alia,* to file any expert report pursuant to O. 40A r. 3 of the Rules of Court 2012 and list of witnesses by 30 November 2023.

[18] In compliance with the above direction, the plaintiff, had on 30 November 2023, filed an affidavit affirmed by Mr Loh Kit Seng of Messrs
D Mazars Risk Management Sdn Bhd pursuant to O. 40A r. 3 of the Rules of Court 2012, exhibiting his expert report titled "Valuation Report in respect of 45% shareholding of Beng Choo Ventures Sdn Bhd in Aman Setia Konsortium Sdn Bhd as of 31 May 2023" dated 27 November 2023 *ie*, encl. 16 (also referred to as "Mazars' expert report").

E **[19]** The defendant did not file any affidavit pursuant to O. 40A r. 3 of the Rules of Court 2012.

[20] As highlighted earlier, the issue as regards to what is the market value of the defendant's entire 45% shareholding in MCL has been included in
F para. 14 of the statement of issues to be tried dated 10 November 2023 signed by solicitors for both parties (encl. 15).

[21] On 5 December 2023, the plaintiff filed its list of witnesses dated 5 December 2023 as directed, which listed three witnesses as follows:

(i) Mr Ooi Inn Kee, a witness of fact as PW1.
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(ii) Mr Tan Chong Ming, a witness of fact as PW2.

(iii) Mr Loh Kit Seng, an expert witness as PW3.

[22] Pursuant to para. 64 of the plaintiff's summary of case dated
H 5 December 2023 (encl. 17), the plaintiff has alluded to Mazars' expert report.

[23] The defendant still did not indicate that the defendant intended to adduce any expert report on the market value of the defendant's shares although the defendant in para. 11 of the defendant's summary of case dated
I 11 December 2023 (encl. 20) contended that "the market value of the defendant's shares is way higher than from what is alleged by the plaintiff and compared to the buying of 55% shares by the plaintiff at the price of RM10 million clearly shows that the plaintiff's allegations are baseless/unfounded".

[24] On 6 December 2023, there was another case management before me wherein:

(i) the plaintiff's solicitors informed that the plaintiff has filed and served the Mazars' expert report on the defendant's solicitors on 30 November 2023, which was confirmed by the defendant's solicitors.

(ii) the defendant's solicitors informed that they will file the defendant's list of witnesses soon and that the defendant will call five witnesses but may be reduced to two witnesses only.

(iii) even at this juncture, the defendant's solicitors did not indicate to the court that they intended to call any expert witness on the issue of valuation of the defendant's shareholding in MCL.

(iv) the defendant was then directed to file the defendant's list of witnesses by 11 December 2023.

[25] Pursuant to the above, the defendant filed their list of witnesses dated 11 December 2023 (encl. 19), whereby they listed only two witnesses, namely:

(i) Mr Lim Teik Chye, and

(ii) Ms Chan Lay Li.

[26] The trial then proceeded as scheduled on 22 to 24 January 2024 with the plaintiff producing the said Mr Ooi Inn Kee as PW1, Mr Tan Chong Ming as PW2 and Mr Loh Kit Seng as their expert witness (PW3) after PW1 and PW2 had completed their evidence and released.

[27] In relation to the expert witness, PW3, counsel for the defendant had completed cross-examination of the plaintiff's expert witness on 24 January 2024, who was released subject to recall only if necessary in relation to the plaintiff's expert witness's computation to be filed in court as regards to the impact of deferment of certain instalments of advance payment to be made by MCL to PKB until 2027 on the value of the defendant's shareholding in MCL.

[28] The matter was then fixed for continued hearing on 21 March 2024 for the recall and limited cross-examination of PW3 (if any) and for the defendant to produce their two witnesses.

[29] On 4 March 2024, the defendant's solicitors emailed the plaintiff's solicitors the witness statement of Andrew Heng and the defendant's additional bundle of documents, which contained Andrew Heng's expert report, which is voluminous at nearly 800 pages.

[30] The plaintiff then filed encl. 45 on 14 March 2024 and the defendant filed encl. 47 on 19 March 2024.

[31] In the meantime, the plaintiff had filed a letter dated 13 March 2024 *vide* encl. 44 enclosing a letter from Mazars dated 29 February 2024 titled "Calculation Summary: Impact of Deferred Payments to Permodalan Kedah Berhad on the Conclusion of Value". The defendant further on 20 March 2024 filed an affidavit by Andrew Heng pursuant to O. 40A r. 3 of the Rules of Court 2012 (encls. 51 to 56).

[32] On the hearing date of 21 and 22 March 2024, notwithstanding encls. 45 and 47 were pending and with a view of not wanting to waste such trial dates, both the defendant's witnesses testified, were cross-examined and released. I then decided that the recalling of PW3 as a witness be kept in abeyance pending a decision on encls. 45 and 47, which I fixed for hearing on 8 May 2024.

[33] On 8 May 2024, having heard parties submit with the aid of their written submissions, I allowed encl. 45 and dismissed encl. 47 and then proceeded to schedule a continued trial on 5 June 2024 merely for the recalling of PW3 to testify on Mazar's letter dated 29 February 2024 (encl. 44).

[34] On 29 May 2024, the defendant filed a stay of proceedings pending the disposal of the appeal to the Court of Appeal (encl. 74) against my ruling on encls. 45 and 47 and the same was fixed for hearing on 5 June 2024. Having heard learned counsel for both parties submit, I dismissed the stay application and proceeded with the continued trial. On that day, counsel for the defendant proceeded with his cross-examination of PW3 limited on the said letter whereafter the plaintiff closed its case. Learned counsel for the defendant informed the court that it could not close its case as it still intended to call Andrew Heng. However, in light of my previous ruling and since the defendant had no further witnesses to call, I proceeded to give directions on filing submissions.

The Parties' Contentions/Submissions

The Plaintiff's Contentions/Submissions In Support Of Its Application In Enclosure 45 And In Objecting To The Defendant's Application In Enclosure 47

[35] The plaintiff in support of its application in encl. 45 and in objecting to the defendant's application in encl. 47 contends/submits as follows:

(i) that the defendant had failed to discharge the burden to show exceptional circumstances in the interest of justice why the defendant should be allowed to call an expert witness after the commencement of trial to give evidence of the market value of the defendant's 45% shareholding in MCL;

(ii) that the expert evidence on the market value of the defendant's 45% shareholding in MCL is something known to the defendant from the pleadings and from the filing of the issues to be tried;

(iii) that the defendant was aware that the plaintiff intended to call an expert witness as early as 11 May 2023 yet elected not to call any expert witness to substantiate their pleaded case that the market value of the defendant's 45% shareholding in MCL is RM 8 to 9 million premised on the plaintiff purchase price of RM10 million in respect of 55% shareholding in MCL;

(iv) that the defendant failed to show good reason for the omission to include Andrew Heng as its expert witness in the defendant's list of witnesses during the pre-trial case even though the defendant has been given an extension of time from 30 November 2023 to 11 December 2023 to file its list of witnesses;

(v) that there are no changes of circumstances beyond the control of the parties to justify the defendant's application at this late hour to call Andrew Heng as its expert witness and to adduce his expert report;

(vi) that the failure to give any reasons for the inexplicable and inordinate delay to comply with the court's directions is fatal to its application in encl. 47;

(vii) that it would go against the objectives of O. 34 of the Rules of Court 2012 to allow the defendant to circumvent the court's pre-trial directions and conduct trial by ambush, particularly on an important point in issue which is already known to the parties long before the commencement of trial;

(viii) that if the defendant is allowed to adduce expert evidence at this late stage of the trial in breach of pre-trial directions given pursuant to O. 34 r. 2(2)(c), (d), (e) and (m) of the Rules of Court 2012, it will tantamount to a miscarriage of justice as these Rules are designed to prevent "trial by ambush" and to ensure full and frank disclosure by the parties before the commencement of trial;

(ix) that the plaintiff has prepared its bundle of documents based on the agreement of both parties and would be effectively blindsided by the new documents;

(x) that Andrew Heng is not an independent witness;

(xi) that the new documents were not put to the plaintiff's witnesses and the plaintiff's witnesses had no opportunity to testify on them;

(xii) that the plaintiff would be deprived of any advantage in law from the failure of the defendant to adduce the new documents at trial *ie*, failure by the defendant to substantiate its case; and

(xiii) that it will severely prejudice the plaintiff if the defendant is allowed to adduce new documents.

The Defendant's Contentions/Submissions In Support Of Its Application In Enclosure 47 And Objecting To The Plaintiff's Application In Enclosure 45

[36] The defendant in support of its application in encl. 47 and objecting to the plaintiff's application in encl. 45 contends/submits as follows:

(i) that Andrew Heng in preparing his report has an overriding duty to this court to address the shortcomings of the plaintiff's expert report;

(ii) that the allegation of the defendant's delay is baseless when the plaintiff likewise delayed in filing their expert report at the end of November 2023;

(iii) that the value ascribed in the plaintiff's expert report does not represent the actual market value resulting in the expert report being an incomplete report;

(iv) that the plaintiff's case has not closed and the trial has not concluded;

(v) that there is no element of trial by ambush;

(vi) the calling of Andrew Heng does not prejudice the plaintiff and the plaintiff will have the opportunity to cross-examine Andrew Heng.

Analysis/Decision

The Applicable Law

[37] It is trite that pursuant to O. 34 of the Rules of Court 2012, cases are managed by a judge with making appropriate orders and giving directions so as to secure a just, expeditious, and economical disposal of the action or proceedings. The list of possible directions are extensively set out and also relate to witnesses including expert witnesses. Relevant to the issue at hand, learned counsel for the plaintiff has referred extensively to the recent case of *Linsun Engineering Sdn Bhd v. Shin Eversendai Engineering Sdn Bhd* [2023] CLJU 635; [2023] 1 LNS 635; [2023] MLJU 691, where Wong Kian Kheong J (as His Lordship then was) dismissed an application to call an expert witness at the eleventh hour after the trial commenced. In his usual manner, His Lordship helpfully sets out extensively the factors which should guide the court when faced with such application when he enunciated as follows:

> [18] I am of the following view regarding the calling of expert(s) as witness(es) in civil suits under RC:
>
> (1) the three objectives of RC are to ensure a just, expeditious and economical disposal of civil actions [3 Objectives (RC)] – please refer to *CELCOM (M) Bhd & Anor v. Tan Sri Dato' Tajudin Bin Ramli & Ors and another case* [2017] 4 AMR 418, at [20];
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> (2) to attain the 3 Objectives (RC), during pre-trial case management (before commencement of trial), the court has the following discretionary powers regarding expert witness(es) -

(a) the court may inquire from parties on whether the parties are calling expert witness(es) and if so, the court may limit the number of expert witness(es) under O. 34 r. 2(2)(p) read with O. 40A r. 1(1) RC [Court's Direction (Number of Expert Witness)];

(b) if parties are calling two or more expert witnesses at a trial, before the commencement of the trial, the court may give directions for "hot-tubbing" of these expert witnesses under O. 34 r. 2(2)(r)(i) and (ii) read with O. 40A r. 5(1) to (3) and (5) RC [Court's Directions (Experts' Hot-Tubbing)]. The Court's Directions (Experts' Hot-Tubbing) may include the following directions -

(i) the experts shall identify the issue(s) [Issue(s) (Expert Opinions)] for which their expert opinions can assist the court - please refer to O. 34 r. 2(2)(r)(i) and O. 40A r. 5(1)(a) RC

(ii) each expert witness shall file an affidavit pursuant to O. 40A r. 3(1) RC which exhibits the following documents -

(a) the curriculum vitae (CV) of the expert which shows the expert's competence under s. 45(1) of the Evidence Act 1950 (EA) to assist the court in respect of the Issue(s) (Expert Opinions); and

(b) the written report of the expert regarding the Issue(s) (Expert Opinions) which complies with O. 40A r. 3(1) and (2)(a) to (h) RC and meeting(s) among experts, parties and solicitors should be held before the commencement of trial so as to prepare a "joint statement" of experts pursuant to O. 34 r. 2(2)(r)(ii) read with O. 40A r. 5(1)(a), (b), (2), (3)(a), (b) and (5) RC (Experts' Joint Statement). The Experts' Joint Statement should state the agreement and/or disagreement between the experts on the following matters -

(a) whether the experts can agree on the Issue(s) (Expert Opinions) to be decided by the court. If there is no such agreement between the experts, each expert may pose his or her own question(s) for which his or her expert opinion can assist the court;

(b) whether the expert of one party disputes the competence of the other party's expert to give an expert opinion on the Issue(s) (Expert Opinions) and *vice versa;*

(c) whether the experts can agree on any one or more of the Issue(s) (Expert Opinions) (Experts' Agreement). According to O. 40A r. 5(5) RC, the Experts' Agreement only bind parties if the parties expressly agree to be bound by the Experts' Agreement; and

(d) if there is a disagreement between the experts on any one or more of the Issue(s) (Expert Opinions) (Experts' Disagreement), the reasons for the Experts' Disagreement - please refer to s. 51 EA and (c)(c) the court may give directions for the examination-in-chief (EIC) and cross-examination (CE) of the experts [Court's Directions (Experts' Testimonies)] as follows -

(i) all the experts are directed to be present in the same session of the Trial;

(ii) to save time and costs, an expert's affidavit shall be tendered as the expert's evidence-in-chief;

(iii) learned counsel who calls the expert as a witness may apply for leave of court to pose additional oral question(s) to the expert during the EIC [Oral EIC (Expert)].

In deciding whether to allow the Oral EIC (Expert) or not, the court should be careful to ensure that the cross-examining party is not prejudiced by the Oral EIC (Expert). This is because the Experts' Joint Statement has already been prepared before the commencement of trial and parties cannot be allowed to resile from the Experts' Agreement. Furthermore, the Oral EIC (Expert) should not be abused to cause a trial by ambush against the party who is going to cross-examine the expert in question;

(iv) the CE of an expert is confined to the Experts' Disagreement. The learned cross-examiner is entitled to be assisted by his or her own expert during the CE of the opposing party's expert; and

(v) learned counsel may apply for leave of court to cross-examine an expert on matters beyond the Experts' Disagreement. Once again, the court must be careful to ensure no injustice is caused to the party who has called the expert because all the parties, their experts and solicitors have participated in the hot-tubbing which has led to the Experts' Joint Statement (which include both the Experts' Agreement and Experts' Disagreement);

(3) in view of the Court's Direction (Number of Expert Witness), Court's Directions (Experts' Hot-Tubbing), Experts' Joint Statement (which include the Experts' Agreement and Experts' Disagreement) and Court's Directions (Experts' Testimonies), as a general rule, the court should not allow a party to call a "fresh" expert (who has not prepared a written expert's report and who has not participated in a hot-tubbing of experts) after the commencement of a trial (General Rule). This General Rule is in consonance with the 3 Objectives (RC).

If the court willy-nilly allows a party (X) to call a fresh expert after a trial has begun, this will cause an injustice to the opposing party (Y) because Y may not be able to call an expert to rebut the expert evidence of X's expert. Furthermore, this will delay the completion

of trial and escalate costs unnecessarily. Lastly, X should not be allowed to circumvent the Court's Direction (Number of Expert Witness), Court's Directions (Experts' Hot-Tubbing) and Court's Directions (Experts' Testimonies) by calling a fresh expert after the commencement of a trial;

(4) there may be exception(s) to the General Rule where the court may allow an expert witness to be called after the commencement of a trial [Exception (General Rule)]. For example -

(a) prior to the commencement of the trial -

(i) X's expert (Z) has affirmed an affidavit which has exhibited Z's CV and written report;

(ii) Z has participated in the hot-tubbing of experts; and

(iii) the Experts' Joint Statement has been adduced as evidence; and

(b) the trial has commenced but before Z can be called by X to give Z's expert opinion and be cross-examined by Y's learned counsel, Z dies or cannot give expert opinion due to medical reason(s).

In the above exceptional circumstances, in the interest of justice, provided that there is no irreparable prejudice to Y, the court may exercise its discretion allow X to call another expert (R) to give expert testimony in place of Z. The application of an Exception (General Rule), regrettably, can only delay the disposal of the case and increase costs.

In such an exceptional event -

(a)(i) X should bear all the costs for the invocation of an Exception (General Rule); and

(a)(ii) Y's learned counsel and expert should be given adequate time to prepare and rebut R's expert opinion; and

(5) (5) by virtue of O. 40A r. 2(1) RC, an "expert" [defined in O. 40A r. 1(2) RC to mean "an expert who has been instructed to give or prepare evidence for the purpose of Court proceedings"] owes a duty to assist the court on matters within his or her expertise [Expert's Duty (Court)]. According to O. 40A r. 2(2) RC, the Expert's Duty (Court) overrides any obligation owed by the expert to the person who has instructed the expert and/or who has paid the expert.

By necessary implication, the Expert's Duty (Court) should include the following two duties owed by an expert to the court [Expert's Implied Duties (Court)] -

(a) an expert has a duty to ensure that the solicitor who has instructed the expert (Instructing Solicitor) is able to contact the expert for the purpose of the trial in question. Accordingly, an expert should be contactable by the Instructing Solicitor at all times before the expert testifies in the case for which the expert has been appointed; and

(b) an expert is obliged to the court to ensure that the expert is able to give his or her expert evidence in court, either physically or virtually.

The following reasons support the implication of the Expert's Implied Duties (Court) -

(i) the sole purpose for the appointment of an expert in a case is to enable the expert to assist the court by way of his or her expert opinion [Sole Purpose (Expert Evidence)]. The Expert's Implied Duties (Court) are necessary so as to attain the Sole Purpose (Expert Evidence);

(ii) a party who has appointed and paid for an expert to testify in a case, may suffer an injustice if the expert is not "available" subsequently to testify for any reason which cannot attributed to the party; and

(iii) if the Expert's Implied Duties (Court) are not implied by the court, this means that an expert who has accepted a party's appointment to give expert evidence in a case and has received payment of his or her expert's fees, can subsequently refuse to testify by making himself or herself "incommunicado". Such an outcome is neither just nor desirable.

[38] In that case, the court did not allow the application on the basis that it caused irreparable prejudice to the plaintiff.

[39] The court gratefully adopts the sentiments of the court in *Linsun Engineering* (*supra*) and agrees that generally, the court should not allow a party to call fresh expert witnesses after the commencement of trial for the following reasons:

(i) it will cause injustice to the opposing party;

(ii) it runs counter to the objective of the Rules of Court 2012, which are to prevent trial by ambush and to ensure a just, expeditious and economical disposal of civil actions;

(iii) it will delay the completion of the trial and escalate costs unnecessarily;

(iv) that the court should not allow a party to circumvent the court's pre-trial directions;

(v) that in an application for leave of the court to call fresh expert witness after commencement of trial, the onus is on the applicant to show exceptional circumstances in the interest of justice and also that there is no prejudice to the opposing party.

[40] The plaintiff also contends that in such an application to call fresh expert witness after the commencement of trial, the onus lies on the defendant to show good reason for not including the new witness in the defendant's list of witnesses and there has been no reasonable explanation given for the delay in the application as pre-trial directions were given to prevent a trial by ambush.

[41] The plaintiff, in support of this contention, refers to the case of *Quantum Petroleum (M) Sdn Bhd & Anor v. Manimaran Periasamy & Ors* [2019] CLJU 2094; [2019] 1 LNS 2094, where Wong Kian Kheong J (now JCA) in dismissing the application to call additional witness after commencement of trial held as follows:

> [22] This court had given pre-trial case management directions (PTCM Directions) for, among others, all parties to file and serve their -
>
> (1) list of witnesses under O. 34 r. 2(2)(i) RC (List of Witnesses); and
>
> (2) witness statements before the commencement of trial of this case.
>
> The PTCM Directions were given to achieve the 3 Objectives and to prevent a "trial by ambush".
>
> [23] I am of the view that the court has a discretion under O. 92 r. 4 RC. the court's inherent jurisdiction and inherent power to allow a party (X) to call a witness (New Witness) who is not listed in X's List of Witnesses. In exercising this discretion, the court may consider the following matters (which are not exhaustive):
>
> (1) whether it is in the interest of justice for the New Witness to be called;
>
> (2) does X have a good reason for not including the New Witness in X's List of Witnesses? In other words, whether X's application for leave to call the New Witness (X's Application) is made in good faith and is not filed for an ulterior, improper or collateral purpose (*eg*, to delay the trial);
>
> (3) the opposing party (Y) is not prejudiced by the calling of the New Witness and if there is any prejudice to Y, such a prejudice can be compensated by costs or by an adjournment of the trial under O. 35 r. 3 RC (with X bearing the costs thrown away in respect of the adjournment of the trial); and
>
> (4) X's Application should be made promptly. If there is any delay in the filing of X's Application, there should be a reasonable explanation for such a delay.
>
> Needless to say, X has the burden to persuade the court to exercise its discretion to allow X to call the New Witness.

[42] The plaintiff further relies on several cases such as *Premium Park Development Sdn Bhd v. Right Base Trading Sdn Bhd* [2021] CLJU 517; [2021] 1 LNS 517; *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107; *Starflex Energy (M) Sdn Bhd v. Gema Antara Sdn Bhd* [2023] CLJU 206; [2023] 1 LNS 206; and *SA Architects Sdn Bhd v. SAA Architects Pte Ltd* [2023] CLJU 1679; [2023] 1 LNS 1679 to support its contention of the court's consistent approach in not allowing the calling of fresh expert witness after the commencement of trial on several grounds reflected above.

[43] Applying the principles enunciated above to the present facts, the onus lies on the defendant to support its application in encl. 47 in respect of calling Andrew Heng after the commencement of trial.

[44] The director of the defendant has averred in this affidavit in support of encl. 47 as follows:

(i) that the defendant only received the plaintiff's expert report at the end of November 2023;

(ii) that due to the shortage of time and given that PW3 will be called as the plaintiff's expert witness, the defendant made the decision not to prepare any questions for PW3 but to only cross-examine him;

(iii) that the defendant's list of witnesses filed on 11 December 2023 clearly made mention of reserving their rights to call further witnesses (if any) to refute the evidence of the plaintiff's witness;

(iv) that attempts have been made to find an expert witness within a short period of time and they have managed to appoint Andrew Heng as their expert witness and the same was served on the plaintiff on 4 March 2024; and

(v) that the paramount consideration in deciding a case has to be justice and on that basis, Andrew Heng should be allowed to be called as it would not prejudice the plaintiff, who may still cross-examine him.

[45] Whilst the court is certainly aware that it is paramount that justice be done, the court is also mindful that rules have been put in place with a lot of time being spent in case managements for a speedy, and economical disposal of the case. The defendant is seeking an exercise of discretion of the court to allow the expert evidence at the eleventh hour but with respect, the court is of the view that such discretion should not be exercised in the defendant's favour for the following reasons.

[46] Firstly, there has been no indication whatsoever from the word "go" that the defendant intended to call any expert witness in relation to the value of the shares. This was in stark contrast of the plaintiff's having consistently informed the court that they would be calling an expert witness on this issue.

Thus, the defendant had, in my view, more than ample time before the commencement of trial on 22 January 2024 to produce an expert witness in compliance with O. 34 r. 2 and O. 40A of the Rules of Court 2012. As such, in my view, the defendant has failed to discharge the burden to show exceptional circumstances in the interest of justice why they should be allowed to call an expert witness after the commencement of trial.

[47] Further, the WhatsApp conversation between learned counsel on 13 December 2023 is clear that even after receiving PW3's expert report, counsel for the defendant had informed that he would not be applying for leave to pose questions to him but would proceed with the hearing without delay and cross-examining the expert witness would be sufficient. This clearly reveals that there was no intent to call any expert witness even at that time.

[48] Thirdly, there is no dispute that the purported evidence to be given by the defendant's additional witness as an expert is in relation to the market valuation of the defendant's 45% shareholding, which was an issue clearly known to the parties from the pleadings long before the commencement of trial.

[49] Further, despite knowing from the very first case management on 11 May 2023 that the plaintiff would be calling an expert witness in respect of the market valuation of the 45% shareholding in the company, the defendant did not elect to call any expert witness. The need to call an additional expert witness only cropped up after the re-examination of PW3 on 24 January 2024. The defendant, in my view, failed to show any reason for the omission in including Andrew Heng or for that matter, any expert witness in the defendant's list of witnesses, notwithstanding the ample amount of time that had been given.

[50] In my opinion, the words used at para. 3 of the defendant's list of witnesses that "defendant's reserve their rights to call further witnesses (if any) to refute any relevant evidence which may be presented by the plaintiff later" does not in any way afford the defendant the privilege to call Andrew Heng after the commencement of trial belatedly at this stage. To be afforded with such privilege would, in my opinion, make a mockery of O. 34 r. 2 and O. 40A of the Rules of Court 2012.

[51] Further, I find there to be no change of circumstances to justify the defendant's application more so when they failed to give any reasons for the inexplicable and inordinate delay in producing any expert report.

[52] The defendant in its submission then sought to contend that the calling of Andrew Heng does not prejudice the plaintiff and the plaintiff will have the opportunity to cross-examine Andrew Heng. However, once again, with respect, I do not agree with the contention of the defendant. The plaintiff's intention to call an expert witness was made clear as early as 11 May 2023

and an expert report was filed and served on the defendant at the end of November 2023. PW3 has also completed his testimony on 24 January 2024 subject to be recalled for further testimony on any variation to the valuation.

[53] Applying the case of *Linsun Engineering Sdn Bhd* (*supra*), the court's power regarding expert witnesses is governed by O. 34 r. 2(2)(p), (r), O. 40A rr. 1, 2, 3(1), 5(1) to (3) and (5) of the Rules of Court 2012 with a clear objective of ensuring just, expeditious and economical disposal of civil actions. See also the case of *Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin Ramli & Ors And Another Case* [2017] 7 CLJ 489; [2017] 4 AMR 418.

[54] Applying the abovementioned cases, as a general rule, this court should not allow the defendant to call a "fresh" expert (who has not prepared a written expert's report and who has not participated in a hot-tubbing of experts) after the commencement of a trial.

[55] Whilst there may be exceptions to the general rule as stated in the case of *Linsun Engineering Sdn Bhd* (*supra*), these exceptions are not applicable to the facts of this case.

[56] From a perusal of the defendant's affidavits as well as their submissions, I am of the considered view that the defendant's justification or circumstances do not fall within the abovementioned exceptions. In my view, allowing the defendant to adduce the expert evidence at this late stage would tantamount to a miscarriage of justice and contrary to the rules which provide for, *inter alia,* for a discussion between the experts and preparation of joint statements on the issues. In my further view, to allow the defendant's application in encl. 47 will occasion grave injustice to the plaintiff as Andrew Heng would be trying to rebut the plaintiff's expert witness after giving evidence and cross-examined and thus preparing the expert report after having the advantage of hearing PW3's evidence in court.

[57] In this regard, the plaintiff makes reference to the intended report of Andrew Heng and draws the court's attention to the fact that he ascribes a value of approximately RM28 million as the value of the said shares being contrary to what was put to PW3 during cross-examination *ie*, that the value was between RM9 to 10 million. In this regard, the court is not minded to look at the substance of Andrew Heng's report as the court is ruling it inadmissible. However, there is certainly merit in the plaintiff's contention that the expert report ought not to be allowed as clearly an attempt to patch up their case after hearing all the evidence of the plaintiff, including the expert witness.

[58] It is also noteworthy that the defendant at para. 13(c) of their outline submission submits that the value ascribed in PW3's report does not represent the actual value, resulting in PW3's report being an incomplete report. However, with respect, this is subject to cross-examination and does not justify the calling of a fresh witness. In fact, PW3 was cross-examined extensively on his report.

[59] In my opinion, the contention now that PW3's report is incomplete is not a cogent nor sufficient reason for Andrew Heng to be called as an expert witness post-commencement of the trial.

[60] I have also noted that the defendant is seeking an order that the witness statement of Andrew Heng (encl. 35) and expert report of Andrew Heng as appearing at pp. 9 to 887 of the defendant's additional bundle of document (encls. 36 to 43) be admissible.

[61] With respect to the admissibility of the additional bundle of documents, reference is made to the case of *SA Architects Sdn Bhd v. SAA Architects Pte Ltd* [2023] CLJU 1679; [2023] 1 LNS 1679, where Azlan Sulaiman JC, in disallowing the defendant's application therein to adduce "new documents" on the third day of the trial, held as follows:

> [13] It goes without saying that the Defendant bears the burden of establishing grounds for this Court to allow the New Documents to be adduced and to order DW1 to be recalled to give further evidence on them.
>
> ...
>
> [23] That historical narrative means that the Defendant knew from over a year before the trial what the Plaintiff's claim was, and knew what documents it needed.
>
> [24] In my view, Chan's explanation that the New Documents were found when the boxes were unpacked is highly dubious and questionable
>
> ...
>
> [28] I also find the explanation that the New Documents were discovered by Sheena, another director of the Defendant, on 25.7.2023 while unpacking some boxes at the new office to be highly dubious and questionable. ... I find the Defendant's allegation that they were found by coincidence to be unbelievable.

[62] Similarly, the Court of Appeal in the case of *Item Industrial Engineering Sdn Bhd & Ors v. Bank Utama (Malaysia) Bhd* [2015] 1 CLJ 933; [2015] 3 MLJ 254 held as follows:

> [45] Whilst I agree that strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, one however must also bear in mind that these forms and rules should not be disregarded for no reason whatsoever since they embody the experience of the courts over the years in the course of speedy and efficient administration of justice. Non-compliance precluded a party in breach from tendering the documents except by leave of court.
>
> [46] The manner in which the plaintiff's counsel had proceeded to prove their case was certainly in my view extremely unsatisfactory. The filing of not one, but four supplementary bundle of documents long after the period to do so had expired, after four of the plaintiff

witnesses had given their evidence, had rightly been objected to by the defendants' counsel. The introduction of additional supplementary bundles of documents, encls. (11), (19), (22) and (24), on a piecemeal and instalment was certainly grossly unfair to the defendants as the defendants had not been given an opportunity to inspect them. The documents listed in supplementary bundle of documents in encls. (11), (19), (22) and (24) clearly were disputed documents.

...

[49] There clearly has been an inordinate and inexplicable delay as to why the documents in the supplementary bundle of documents were not introduced earlier. The documents were always in the possession of the plaintiff but did not find it fit to file the same. The plaintiff's witnesses Azman bin Baharin (PW5), Lee Huan Nee (PW6), Johari Ariff bin Osman (PW7) and Yeap Eng Lock (PW8) testified before the court that all these documents in encls. (19), (22), (23) and (24) were available way back in 2003, the year when the case management was held.

[50] Counsel for the plaintiff clearly has not been diligent in preparing the plaintiff's case. Diligence means earnest and meticulous pursuit towards the attainment of one's goal. The plaintiff's counsel has, in my considered opinion, adopted a lackadaisical attitude in the preparation of his case and guilty of indolence. The question of denying the plaintiff the right to produce those documents does not arise. The plaintiff has only itself to blame for the predicament it had found itself in. Justice was not only to the plaintiff but also to the defendants. I am of the view that the objection taken by the defendants' counsel should have been sustained. Not having obtained leave of the court, the plaintiff should not have been allowed to introduce additional witnesses as a matter of course, and for such witnesses to refer to the documents listed in the supplementary bundles filed at mid-way through trial also as a matter of course.

[51] I am compelled to conclude that the learned judge had arrived at his decision on evidence the veracity of which remains suspended. The evidence led by additional witnesses by reference to the documents listed in the supplementary bundle of documents must be expunged from the court record. They should not have been taken into consideration. Shorn of these evidence there was no evidence that the defendants had complied with the conditions precedents imposed by the plaintiff, the consequence of the facility either not utilised or the same was withdrawn by the plaintiff.

[63] Applying the above to the present facts, I am also of the considered view that such documents should not be allowed as the defendant filed the same on 4 March 2024, long after the period to do so had expired and after the plaintiff's witnesses had given their evidence in court. The introduction

of these additional bundle of documents at this late stage is certainly grossly unfair to the plaintiff as they had prepared for trial on the basis that the bundle of documents has been disclosed and agreed upon by both parties.

[64] Further, as reiterated above, there is clearly an inordinate and inexplicable delay as to why these additional documents were not introduced earlier. The reason provided that there was a shortage or insufficient time to find an expert witness does not in my view justify such delay on the part of the defendant in introducing the supplemental/additional bundle of documents. They had ample time from the onset of the case that the market valuation of the shares is a critical and live issue.

[65] As such, consequential to my finding that the defendant has failed to show good reason for not including Andrew Heng in the defendant's list of witnesses, I would similarly find that the defendant failed to justify the inordinate and inexplicable delay as to why these additional documents (encls. 36 to 43) were not introduced earlier and would not admit the same in these proceedings.

Conclusion

[66] In the upshot, based on the facts and circumstances of the case as well as the chronology of events that had transpired, I dismiss the defendant's application in encl. 47 and allow the plaintiff's application in encl. 45.